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MARY ELLEN DUNLAP
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCHISE

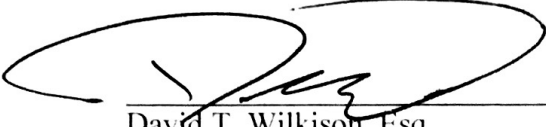
STATE OF ARIZONA,)	
)	No. CR201800212
Plaintiff,)	
)	REPLY TO STATE'S
)	RESPONSE TO MOTION
)	FOR REMAND TO
)	THE GRAND JURY FOR
)	REDETERMINATION OF
)	PROBABLE CAUSE
vs.)	
)	
FAUSTO NAVARRO,)	
)	
Defendant.)	Hon. John F. Kelliher Jr.
)	Div. II

The Defendant, FAUSTO NAVARRO, by and through undersigned counsel, respectfully Replies to State's Response to Motion For Remand to The Grand Jury for Redetermination of Probable Cause and requests this Court to REMAND this matter to the Cochise County Grand Jury for a redetermination of probable cause.

1 This motion is based upon the 5th, 6th and 14th Amendments to the United States
2 Constitution, Article 2 Sections 4, 10, 24 and 30 of the Arizona Constitution, Rule 12 et
3 seq. of the Arizona Rules of Criminal Procedure and the attached memorandum of points
4 and authorities which is incorporated herein by this reference.

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6 RESPECTFULLY SUBMITTED this 2 day of May, 2018.

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9 THE W LAW FIRM P.L.L.C.

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12 David T. Wilkison, Esq.
13 Attorney for Defendant
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MEMORANDUM OF POINTS AND AUTHORITIES

I. LAW AND ARGUMENT:

I. The State Misapplies the “Facts” in it’s Response Motion and Misinterprets the Law.

1) The State’s “Factual Summary” is Not Factual:

In it’s response motion, the State attempts to persuade this Court into believing that the brothers “conspired” to lure the alleged victims over to their house the night in question. This is false and is merely a made-up belief, not supported by any actual evidence. In reality, the “evidence” that has been provided to the defense as it relates to this conspiracy of the defendant’s wanting to go “rabbiting” is actually not supported by anything other than a typed-up document, presumably by someone at the Benson Police Department, of an interpretation/translation of what the Spanish text messages between the two defendants said to each other. It is unknown if this “translation” was done by a certified translator, but according to the defendants, it is nowhere near what was said in that text message.

Additionally, no forensics on *any of the phones* was done by the State. The defense has requested all of the phones be forensically examined as it believes exculpatory information about the night in question will be found.

2) *O’Meara v. Superior Court* was vacated on Different Grounds than the single quote that was cited to in Defense’s Remand Motion.

In defense’s Motion to Remand, the defense cited *O’Meara v. Superior Court* after stating “[t]he prosecutor’s duty to present evidence to the grand jury in a fair and unbiased manner is very important because of the ex parte nature of the hearing.” See Motion to Remand to the Grand Jury for Redetermination of Probable Cause, pg. 4, In 20-21. In it’s Response Motion, the State tells this Court to disregard any citations in the Defendant’s motion because the *O’Meara v. Superior Court* case was vacated by *O’Meara v. Gottsfeld* case (which was also cited by the defense). This is not entirely accurate for the following reasons:

1 The *O'Meara v. Superior Court* case was vacated by *O'Meara v. Gottsfeld* case.
2 However, it was vacated on the bases that the prosecutor had no duty to re-read the
3 applicable statutes to the Grand Jury once they had already been read to them previously.
4 See *O'Meara v. Gottsfeld*, 174 Ariz. 576, 851 P.2d 1375 (1993). This ruling did not say
5 that the State could present evidence to the grand jury in an *unfair and biased* manner,
6 nor did this ruling state that the Grand Jury proceedings are to not be presented in an *ex*
7 *parte* manner.

8 Additionally, all the case law in the defense's Motion to Remand supports the
9 single statement from the *O'Meara v. Superior Court*, that the grand jury proceedings are
10 to be presented fairly and in an unbiased manner because the defense, nor the judge are
11 there. So, while the State would like to point out the fact that the case was vacated, it was
12 vacated on different grounds and the one sentence that was cited from it in defense's
13 Motion to Remand still stands.

14 **3) The Term "Substantial Procedural Right" is Clear on it's Face.**

15 The State in it's Response Motion states that "the term substantial procedural
16 right is not defined by rule or case law in Arizona." See State's Response pg. 3, ln 17-18.
17 However, the term is clear on it's face and cannot be misconstrued that it is some sort of
18 legal fiction because there is not a direct definition of it. A search in Black's Law
19 Dictionary shows that when the term "Procedural Right" is looked up, it refers the reader
20 to "SEE RIGHT." Black's Law Dictionary 1241 (8th ed. 2004) When the term
21 "Substantial Right" is looked up, it refers the reader to "SEE RIGHT." Black's Law
22 Dictionary 1470 (8th ed. 2004) The word "Right" is defined as the following:

23
24 "1. That which is proper under law, morality, or ethics, <know right from
25 wrong>. 2. Something that is due to a person by just claim, legal
26 guarantee, or moral principle <the right of liberty>. 3. A power, privilege,
27 or immunity secured to a person by law <the right to dispose of one's
28 estate>. 4. A legally enforceable claim that another will do or will not do a
given act; a recognized and protected interest the violation of which is a
wrong <a breach of duty that infringes one's right>.

Black's Law Dictionary 1347 (8th ed. 2004)

1 Therefore, a substantial procedural right is something that is proper under
2 the law for that particular right. In other words, a substantial procedural right,
3 when referring to the grand jury proceedings, is what is morally and ethically
4 right and also abides by the law for grand jury proceedings. Substantial
5 procedural right is also a legal guarantee, a privilege, a legally enforceable claim
6 that another will do or not do a certain act. See *Id.*
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9 Although it is not expressly stated in case law, nor in Arizona Rules of Criminal
10 Procedure 12.9, when one defendant's facts of the case are presented to the grand jury
11 and those facts taint the other defendant's case, a *substantial procedural right* has
12 occurred. This is because *all* the case law on grand jury proceedings have one common
13 theme, it *must* be unbiased and fair. See *Francis v. Sanders*, 222 Ariz. 423, 215 P.3d 397
14 (Ct. App. 2009) (In a grand jury proceeding, the prosecutor must fairly and impartially
15 present the evidence.); *Maretick v. Jarrett*, 204 Ariz. 194, 62 P.3d 120 (2003) (A
16 prosecutor is the representative not of an ordinary party to a controversy, but of a
17 sovereignty whose obligation to govern impartially is as compelling as its obligation to
18 govern at all; in this unique role, the prosecutor is in a peculiar and very definite sense the
19 servant of the law) *Id.* (Because defendants enjoy few procedural rights before the grand
20 jury, grand juries must be unbiased and independent and must act independently of either
21 prosecutor or judge.) *Id.* (Prosecutors bear a particularly weighty duty not to influence a
22 grand jury because the defendant has no representative to watch out for his interests
23 before the grand jury.); *Wood v. Georgia*, 370 U.S. 375, 390, 82 S. Ct. 1364 (1962) (
24 Historically, [*the grand jury*] has been regarded as a primary security to the innocent
25 against hasty, malicious and oppressive persecution; it serves the invaluable function in
26 our society of standing between the accuser and the accused, whether the latter be an
27 individual, minority group, or other, to determine whether a charge is founded upon
28 reason or was dictated by an intimidating power or by malice and personal ill will. citing

1 *U.S. v. Calandra*, 414 U.S. 338, 343, 94 S. Ct. 613 (1974); *U.S. v. Mandujano*, 425 U.S.
2 564, 573, 96 S. Ct. 1768 (1976); *Branzburg v. Hayes*, 408 U.S. 665, 686–87, 92 S. Ct.
3 2646 (1972); *U.S. v. Cox*, 342 F.2d 167, 186 (5th Cir. 1965)) See also 1 Crim. Prac.
4 Manual § 17:3 (The Grand Jury Clause requires indictment by an independent, informed
5 and unbiased grand jury. A prosecutor's knowing exclusion of substantial exculpatory
6 evidence negating guilt undermines that constitutional mandate by preventing the grand
7 jury from performing its role as a shield to protect individuals from unwarranted
8 prosecution. The Due Process Clause requires that the grand jury process remain
9 fundamentally fair and undistorted by prosecutorial manipulation. When the prosecutor
10 manipulates or misleads the grand jury, the fundamental fairness of the grand jury
11 process is impugned.)

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13 The State would like to have this Court believe that because there is no
14 case law or direct law on co-defendant's cases not being presented together when
15 one defendant's facts shed a negative light on the other then they should be
16 presented separately, then it is automatically ok for them to be presented together.
17 This is an incorrect assumption. The same basic premises apply for all grand jury
18 proceedings: fair and impartial.

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20 **4) The State is Putting the Cart before the Horse.**

21 In it's Response Motion, the State argues that the defense's argument is
22 that of which should be a Motion to Sever rather than a Motion to Remand. See
23 State's Response, pg 5, ln 2-3 ("In effect, the Defense argues that the cases
24 against the Navarro's should be severed, but that is not the motion before this
25 court." [sic]. However, the Grand Jury proceedings come prior to *anything* in the
26 criminal justice system. If that is flawed, then a remand is not only necessary, but
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1 required to ensure fairness, akin to a substantially procedural right, has not been
2 violated.

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4 **5) The State Attempts to Shift the Burden and Misapply the Law.**

5 In it's Response motion, the State argues that the defense has not shown how
6 separate presentations would make any difference. See State's Response pg. 5, ln 8-11.
7 However, the defense does not need to show how it would make a difference, the defense
8 need only show that a substantial procedural right was violated during the grand jury
9 proceeding. See *Maretick*_204 Ariz. 194, 62 P.3d 120. It would be the defense's hope
10 that the State would therefore not make the same error twice and would remedy the
11 situation so as to not taint the jury. Even if this back-to-back presentation that the State
12 alludes to does have to happen, then an admonishment would hopefully be given to the
13 grand jury. However, neither of these scenarios occurred during the Navarro's grand jury
14 presentations.

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1 **II. CONCLUSION**

2 The State did not present evidence in a fair and impartial manner. This biased
3 testimony violated Mr. Navarro's due process rights to a fair and impartial presentation of
4 the evidence.

5 A remand is not only needed, it is required in order to ensure Mr. Navarro
6 receives a fair and unbiased presentation of the evidence for a determination of probable
7 cause. Grand jury proceedings are a primary security to the innocent against hasty,
8 malicious and oppressive persecution. Because of the importance of this initial step in
9 the legal process, nothing can be overlooked when dealing with a defendant's Due
10 Process Rights. Mr. Navarro's Due Process Rights were violated in his grand jury
11 proceedings as discussed above, and as such a remand for redetermination of probable
12 cause is necessary to ensure no further Constitutional violations occur.

13 RESPECTFULLY SUBMITTED this 2 day of May, 2018.

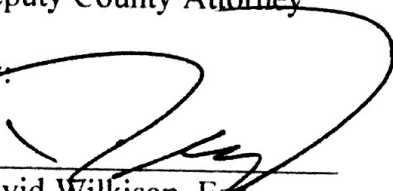
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16 THE W LAW FIRM P.L.L.C.

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19 David T. Wilkison, Esq.
20 Attorney for Defendant

21
22 A Copy of the foregoing
23 Sent/Emailed on May 2, 2018 to:

24 The Honorable John F. Kelliher Jr.
25 Cochise County Superior Court

26 Michael Powell
27 Deputy County Attorney

28 By: 
 David Wilkison, Esq.